87-2051

(1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is an ordinance which prohibits the operation of a lawful business which presents sexually oriented, nonobscene entertainment, by any person who has been previously convicted of an obscenity offense or certain other crimes, or whose spouse has been so convicted, an unlawful prior restraint, as condemned in *Near v. Minnesota*, 283 U.S. 697 (1931) and as suggested in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)?

2. Is a municipal ordinance which requires a license before one may engage in protected expression, and which fails to provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965) after denial or revocation of a license, an unlawful prior restraint?

3. Is a zoning ordinance which forces the closure of 100% of a city's adult cabarets, and 92% of all adult businesses, subject to strict scrutiny under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), or to the deferential standard of review allowed for prospective zoning regulations in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)?

4. Does an ordinance restricting adult cabarets to mostly industrial, poorly lit, unsafe areas where economic survival is virtually impossible, thus drastically reducing the number of adult cabarets, violate the requirement of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) that a

city must refrain from denying such businesses a reasonable opportunity to open and operate?

5. May a city, through zoning, close every adult cabaret in the city, even though they had been operating lawfully for many years while causing no adverse secondary effects, or must the ordinance apply to new businesses only, as indicated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)?

LIST OF PARTIES

There were three groups of Appellants in the consolidated case in the Court of Appeals. Petitioners herein are listed in Group I, and all other Appellants in Group II.

I.

M.J.R., Inc.; Tempo Tamers, Inc.; S.B. LaBare, Inc.; Allen & Burch, Inc.; Southern Belles Partnership, Inc.; D. Burch, Inc.; Deja Vu, Inc.; Corporation Lex, Inc; and S.B. Youngbloods, Inc.

II.

FW/PBS, Inc.; DSB, Inc.; Lone Star Multi Theatres, Inc.; Bi-Ti Enterprises, Inc.; Gattie Corporation; J.R.E. Enterprises; Entertainment Unlimited; Charles E. Carlock; Beverly K. Van Dusen; Bill Staten, Jr.; Calvin Berry, III; Saujay Patel; Rudolph Fernandez; and Dallas Motel Association.

The following parties were Appellees in the Court of Appeals: The City of Dallas, Texas; A. Starke Taylor, Mayor; and Billy Prince, Chief of Police.[1]

There are no entities to report or list pursuant to this Court's Rule 28.1.

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[1] Pursuant to Supreme Court Rule 40.3, former Mayor Taylor and former Chief of Police Prince, will be replaced in this case by their successors in office, Mayor Annette Strauss and acting Chief of Police Louis Caudell. Mayor Taylor and Chief Prince were sued in their official capacities only.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible for a City to Deny a License to Engage in Future Speech Activities Because of a Past Violation of an Obscenity Law or Other Law Conflicts With This Court's Opinion in *Near v. Minnesota*, 283 U.S. 697 (1931), and With Numerous Opinions of the Federal Courts of Appeals and State Courts of Last Resort. 9

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported as *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) is reprinted in Appendix A. The opinion of the United States District Court for the Northern District of Texas, reported as *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), is reprinted in Appendix B. The order of the Court of Appeals denying the petitions for rehearing and suggestions for rehearing *en banc* is reprinted in Appendix C. The order of this Court granting a stay of the

judgment and mandate of the Court of Appeals is reprinted in Appendix D.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on February 12, 1988. A petition for rehearing and suggestion for rehearing *en banc* were timely filed. The order denying rehearing and rehearing *en banc* was entered on March 14, 1988. This petition is filed within 90 days of that date. The opinion of the Court of Appeals, upholding the final judgment of the District Court, dismissing Petitioners' claims of the abridgment of rights guaranteed by the First Amendment to the United States Constitution, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF DALLAS CITY CODE

Chapter 41A of the City Code of Dallas, Texas is included in its entirety as an appendix to the opinion of the District Court, and is reprinted in Appendix B.

STATEMENT OF THE CASE

Petitioners each operate an adult cabaret[2] in the City of Dallas, Texas. Each Petitioner was in business prior to June 18, 1986. The cabarets had operated lawfully, without causing any deleterious effects on surrounding neighborhoods, for many years.[3] Many were in areas where commercial property had steadily risen in value during the entire time they were there, and where the crime rate was low.

On June 12, 1986 the Dallas City Plan Commission recommended to the City Council the adoption of a proposed ordinance restricting locations where adult businesses could

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2 An "adult cabaret," defined in § 41A-2(2) of the ordinance, is a commercial establishment which regularly features nonobscene entertainment in which performers dance while semi-nude.

3 When asked by the District Court if there was any evidence that the cabarets in Dallas had caused any adverse secondary effects, the City replied that it had relied on a study done in Austin, Texas.

operate, and imposing licensing and inspection requirements on them. The Council enacted the ordinance on June 18, 1986.

The Council saw no evidence relating to the city's adult cabarets. Nor was the Council advised that the zoning provisions would close 92% of the adult businesses in the city, including every one of the adult cabarets. The ordinance created a licensing scheme for all adult businesses, and imposed zoning restrictions on them. The ordinance took effect upon passage,[4] but contained an amortization clause allowing adult businesses which were in violation of the zoning restrictions to continue in operation for three years.

The impact of the zoning provisions is severe. It was uncontroverted at trial that of approximately 120 adult businesses in operation in the City at the time the ordinance was enacted, about 110 will have to close their doors and seek new locations by June 18, 1989. Every one of the City's 29 adult cabarets faces closure.[5] The Cabarets had presented considerable evidence to demonstrate that their physical

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4 As the City acknowledged in its Response to Motion for Stay of Mandate filed in this Court, the licensing prohibitions have already been used against two persons to revoke licenses for convictions of obscenity offenses.

5 The court held that because the land areas where adult businesses could locate comprised approximately 9% of the city, and were accessible by major roadways, there was reasonable opportunity for such businesses to relocate. The trial court did acknowledge, during argument on the motions for summary judgment, that Petitioner S.B. LaBare wold be forced to move to areas where not enough of its female customers would be willing to go to allow the business to remain open, and that it would probably be forced out of business.

requirements -- such as building size, traffic access, and parking areas -- were very different from those of most other adult businesses. Thus, the cabarets argued that while the areas established might be suitable for some types of businesses, such as escort services, they were effectively unavailable for adult cabarets.[6] In competing for entertainment dollars, the cabarets depend upon affluent customers who have financial means, a clientele that would avoid the relocation areas designated by the City. The City's evidence did not address this contention, and the trial court never considered it.

The areas in which new businesses must compete for space -- including the 110 businesses to be closed by the ordinance -- are mostly industrial zones, with poor lighting, no retail activity, and high crime rates. This factor is important in light of the statement in the ordinance that "it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market." The city offered no evidence, or explanation, of the repudiation of this avowed purpose by its ultimate solution that would move adult cabarets from areas which do not have high crime rates to areas that do and where economic death awaits.[7] Three lawsuits

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6 The City has never claimed, -- before the Plan Commission, the City Council, the District Court or the Court of Appeals -- that the ordinance would not severly reduce the number of adult *cabarets*. The City has only argued that it will not reduce the number of adult *businesses*.

were filed in the United States District Court challenging Chapter 41A. The cases were consolidated, and the trial court requested all parties to file motions for summary judgment. On September 12, 1986 the court granted the motion filed by the City, upholding virtually all of the ordinance, and dismissed the cases. The court held that denial of a license to one who has been convicted of a sex-related offense furthers the city's purpose of preventing crime in adult businesses.[6]

The trial court rejected as irrelevant the testimony of the adult cabarets that they could not survive economically if they were forced to relocate into the predominately industrial, poorly lit, unsafe, high crime areas; the court called that a "business judgment." App. B-20, n.23.

A timely appeal was taken to the United States Court of Appeals for the Fifth Circuit. On February 18, 1988 that Court, in a 2-1 decision, affirmed the trial court granting summary judgment in favor of the City.

The majority declined to apply a strict scrutiny standard of review, finding that a restriction on sexually oriented expression need only be reasonable. Stating that because the licensing provisions regulated sexually oriented expression,

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7 Even the City's expert at trial, Leon Hurse, while claiming that there were approximately 200 sites where adult businesses could locate, identified only two potential sites for adult cabarets.

8 Neither the Plan Commission nor the City Council were presented with any evidence that there *was* any crime in the city's adult cabarets. And the only evidence of criminal activity presented by the City to the district court -- doesn't even mention adult cabarets.

and ruling that that type of speech is entitled to less First Amendment protection than other forms of constitutionally protected expression, the majority analyzed the licensing restrictions under the more deferential standard of review applied to time, place and manner regulations.

Applying that lesser standard of review, the majority held that because the relationship between the specific crimes for which convictions cause license disqualification and the "evil to be regulated is direct and substantial," the ordinance' criteria for denying or revoking a license were sufficiently narrowly tailored to be constitutional. The Court of Appeals, like the District Court, also rejected Petitioners' argument that the licensing ordinance should have included procedural safeguards designed to prevent unlawful prior restraints, as required by *Freedman v. Maryland*, 380 U.S. 51 (1965).

In his dissent, Judge Thornberry stated that the licensing provisions were an unconstitutional prior restraint of activities protected under the First Amendment.

The panel unanimously upheld the zoning restrictions. Although the ordinance prohibited adult businesses from locating within 1,000 feet of churches, schools, residential districts, individual residential units and public parks, the panel referred only to the restriction against locating a sexually oriented business within 1,000 feet of another such business. This provision, the panel held, furthered the announced purpose of the ordinance to prevent a concentration of adult

businesses in any area. The panel did not indicate how the other provisions prevented a concentration.

As both the District Court and the Court of Appeals noted, there was no study done by the City of Dallas as to whether previously existing adult businesses had caused any adverse secondary effects. The commission saw no evidence relating to the city's adult cabarets. No report discussed the types of districts in which they were located. No evidence indicated that they had caused any impact on nearby property values, or that crime rates were higher in their neighborhoods.

Finally, the panel concluded that the zoning restrictions, which left about 8% of the city's land area available for adult businesses, provided reasonable alternative avenues of communication. The panel did not discuss Petitioners' evidence, that the alternative sites might support some types of businesses, but that adult cabarets would be practically eliminated from the city.

Petitions for rehearing and suggestions for rehearing *en banc* were denied on March 14, 1988. On May 4, 1988 this Court entered a stay of the judgment of the Court of Appeals except the portion upholding the zoning provisions of the ordinance.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DALLAS LICENSE REQUIREMENT FOR ADULT ENTERTAINMENT BUSINESSES CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible for a City to Deny a License to Engage in Future Speech Activities Because of a Past Violation of an Obscenity Law or Other Law Conflicts With This Court's Opinion in *Near v. Minnesota*, 283 U.S. 697 (1931), and With Numerous Opinions of the Federal Courts of Appeals and State Courts of Last Resort.

By a 2-1 opinion, the Court of Appeals not only concluded that a city may deny a license to engage in future speech activities because of a prior obscenity violation or other offense,[9] but also concluded that this restriction on speech

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[9] The offenses are: prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; any violation of Chapter 41A (the ordinance challenged herein); or criminal attempt, conspiracy or solicitation to commit any of the foregoing offenses.

should be analyzed under a deferential standard of review, rather than the strict scrutiny traditionally required of any law requiring a license to engage in First Amendment activity. The majority refused to require the city to demonstrate a "compelling necessity" for the occupational bars it enacted, concluding: "On balance we are persuaded that only a 'substantial relationship' need be shown between the conviction and the evil sought to be prevented." App. A15.

Applying this erroneously deferential standard of review, the Court of Appeals upheld a broadly sweeping prohibition which clearly violates the limits this Court and lower federal courts have consistently placed upon such regulation of First Amendment activity. The Court of Appeals held that the City of Dallas could deny speech rights prospectively because of a prior speech violation, a conclusion patently in conflict with this Court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931). The majority opinion also conflicts with a 14 - 0 *en banc* opinion of the same Circuit, *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (*en banc*), *aff'd on other* grounds, 445 U.S. 308 (1980), deciding that a nuisance law would be unconstitutional if used to padlock a bookstore or theater because of prior obscenity violations.[10]

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10 The ordinance upheld in this case even permits the forfeiture of free speech rights solely because one's spouse has previously been convicted of an obscenity offense or some other type of crime. Neither the District Court nor the Court of Appeals suggested how the prohibition against one

The majority opinion is also in conflict with a myriad of other decisions of the federal appellate courts and state courts of last resort which have concluded that prior obscenity violations cannot justify the prospective interference with First Amendment rights by the denial or revocation of a business license or the padlocking of a bookstore or theater where the offense was committed.[11]

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whose spouse has been convicted furthers any legitimate governmental purpose, much less a compelling interest.

11 The following cases have held unconstitutional laws which allow a permit to be either denied or revoked upon proof of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1207-09 (C.D. Ill. 1979), *aff'd*, 619 F.2d 1203, 1217-20 (7th Cir. 1980); *Gayety Theaters, Inc. v. Carson*, 470 F. Supp. 1140 (M.D. Fla. 1979); *San Juan Liquors v. Consolidated City of Jacksonville*, 480 F. Supp. 151 (M.D. Fla. 1979); *Yuclan Enterprises, Inc. v. Arre*, 488 F. Supp. 820 (D. Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F. Supp. 994 (S.D. N.Y. 1972); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D. N.Y. 1979); *Oregon Bookmark Corp. v. Schrunk*, 321 F. Supp. 639 (D. Ore. 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D. Utah 1980); *Perrine v. Municipal Court*, 448 P.2d 648 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz County Board of Supervisors*, 128 Cal.App.3d 369, 374-75, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 334 N.E.2d 190 (Ill. 1975); *Alexander v. City of St. Paul*, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres, Inc. v. City of Newark*, 374 A.2d 502 (N.J. 1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 505 P.2d 126 (Wash. 1973); *see also, Intern. Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-33 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-30 (1981); *cf. Chulchian v. City of Indianapolis*, 477 F. Supp. 128, 131-32 (S.D. Ind. 1979), *aff'd*, 633 F.2d 27,30 (7th Cir. 1980); *Marks v. City of Newport, Kentucky*, 344 F. Supp. 675 (E.D. Ky. 1972).

The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co. v. Vance*, 587 F.2d 159, 164-66 (5th Cir. 1978) (*en banc* -- as to this point, all fourteen judges of the court were in agreement), *aff'd on other grounds*, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F. Supp. 261, 269-72 (E.D. La. 1984);

Additionally, insofar as the Court of Appeals upheld the balance of the statutory grounds for disqualification without requiring the showing of a "compelling necessity," its opinion also conflicts with numerous decisions of this Court holding that fundamental First Amendment rights cannot be abridged unless the government proves such a compelling necessity. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), and cases cited therein.

By authorizing the denial of a license on grounds which are not proven to be of compelling necessity, the majority's opinion also conflicts with a long line of this Court's cases holding that laws requiring a license to engage in First

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General Corp. v. Sweeton, 320 So.2d 668 (Ala. 1975), *cert. denied*, 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600 (Cal. 1976), *cert. denied*, 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971); *Sanders v. State*, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 518 N.E.2d 775 (Ill.App. 1988); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Kansas v. Motion Picture Entitled "The Bet"*, 547 P.2d 760; (Kan. 1976); *Giarusso v. D'Iberville Gallery*, 295 So.2d 891 (La. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480; (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So.2d 158 (La. 1977) (*overruling* La.App., 341 So.2d 23); *Society to Oppose Pornography v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex. rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 412 S.W.2d 890 (Tenn. 1967). *See also, J.R. Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-95 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F. Supp. 482, 491-92 (N.D. Ind. 1974), *vacated and remanded on other grounds*, 423 U.S. 976 (1975:), *order re-entered* August 16, 1976 (unpub.), *aff'd*, 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612, n. 23 (1975). *Cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch,"* 307 N.E.2d 911 (Ohio 1974).

Amendment activity must be subjected to much more exacting scrutiny than those which license nonexpressive conduct.[12] These cases recognize: (1) that the requirement of a license before one may engage in expression is the kind of prior restraint most hated by the Framers; and, (2) such laws must be subjected to the strictest level of scrutiny to ensure against the possibility of censorship under the guise of regulation.

Moreover, strict scrutiny of even the nonexpressive disqualification criteria is in no way inconsistent with this Court's opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Although the Court in that case upheld an *in rem* closing of an adult bookstore due to illegal acts manifesting "no element of protected expression," the Court carefully distinguished the situation where a prospective ban on speech would generally apply at all locations. By contrast, the denial of a license for prior noncommunicative illegal conduct is an outright restraint on all future expression at any location.

Persons convicted of the various crimes of disqualification in the Dallas ordinance are not categorically barred from obtaining *any* licenses, but are only prohibited from obtaining a license to operate an adult entertainment business.[13] Thus, this case also involves the situation where an ordinance, based in part on nonexpressive activity,

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12 *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Saia v. New York*, 334 U.S. 558 (1948); *Lovell v. Griffin*, 303 U.S. 444 (1938); and *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)

13 See § 41A-4(c) and (e) and § 41A-5(a).

singles out those engaged in expression for imposition of its burden.

The importance of the questions presented by this case is further underscored by the fact that this Court has granted review in *Fort Wayne Books, Inc. v. Indiana, cert. granted,* ____ U.S. ____, 108 S.Ct. 1106 (1988), which poses a similar constitutional question: whether prior obscenity violations can justify an injunction against future speech.

The licensing issue decided by the Court of Appeals involves constitutional questions of nationwide importance. If this ordinance is sustained, the prior restraint doctrine and the security of First Amendment freedoms generally will be greatly undermined. Similar laws targeting communicative businesses for license denial or revocation upon the commission of a speech-related offense or virtually any other violation, no matter how petty, would threaten the very existence of innumerable First Amendment businesses. In principle, nothing would prevent the passage of legislation authorizing the closure of newspapers by forfeiture of licenses for instances of defamation. Because the Court of Appeals' opinion has such wide-ranging implications and conflicts with the applicable decisions of this Court, and many other courts this Court should grant review.

B. By Analyzing a License Requirement for Adult Entertainment Businesses Under the More Deferential Time, Place and Manner Standard of Review, the Court of Appeals

Rendered a Decision Contrary to This Court's Decisions Defining a Time, Place and Manner Regulation.

Review should also be granted in this case to correct the confusion caused by the Court of Appeals' misapplication of the standards for reviewing time, place and manner regulations of speech to an ordinance which regulates neither the time, place nor manner of speech but, instead, requires a license as an absolute prerequisite to engage in constitutionally protected expression.

In Point III of its opinion, the Court of Appeals upheld the license requirement for all adult entertainment businesses against Petitioners' challenge that it was facially invalid because it lacked adequate procedural safeguards to guarantee that it could not be used as a tool for censorship by either inherent or intentional delay. Before dealing specifically with the argument that the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) should be required of such a licensing law, the Court of Appeals stated its belief that *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) had held that adult entertainment businesses are entitled to a lesser degree of procedural safeguards and other First Amendment protections than those engaged in other types of First Amendment activity, including "followers of the Krishna religion" who, the court noted, successfully challenged an airport solicitation licensing law in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124

(1982), due to its lack of procedural safeguards. App.A-6. Bluntly summarizing what it believed to be this Court's holding in *Renton*, the Court of Appeals stated: "[T]he Court held that sexually-explicit materials deserve less first amendment protection than other kinds of speech." App. A-8.

Review of this aspect of the Court of Appeals opinion is crucial for two distinct reasons. First, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a majority of the members of this Court rejected the dangerous and unprecedented notion that nonobscene sexually-oriented expression is deserving of less First Amendment expression than less controversial types of expression.[14] *Renton* did not overrule that precedent but merely concluded that regulations of the time, place or manner of operating establishments primarily devoted to the sale or exhibition of such materials may be permissible if the *justification* for such time, place and manner restrictions is content-neutral. If the

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14 In *Young*, this majority consisted of dissenting Justices Stewart, Brennan, Marshall and Blackmun, joined in this point by Justice Powell, who concurred in the judgment. 427 U.S. 73, n. 1 (POWELL, J., concurring): "I do not think we need reach, nor am I inclined to agree with, the holding in Part III . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression."

Justice Powell reiterated this position in his subsequent concurring opinion in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) when he refused to join in a portion of the court's plurality opinion because he did "not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.

Court of Appeals' decision is allowed to stand, it will create precedent for the extremely dangerous proposition that the degree of protection to be afforded a particular type of speech diminishes with the amount of controversy surrounding it. However, it is precisely when speech is most controversial that the full protection of the First Amendment is most needed. This Court should grant review in order to address squarely this most fundamental of First Amendment issues.

Second, by concluding that a content-based licensing law (applicable only to sexually-oriented businesses) should be analyzed as a "time, place or manner" restriction, the Court rendered an opinion in conflict with all of this Court's prior decisions defining a time, place or manner regulation. A law requiring a license as a prerequisite to engage in speech regulates neither the time, the place nor the manner of speech but, instead, as noted by dissenting Judge Thornberry, "the denial of a license completely bans the speech of the person denied and does not leave the speaker alternative avenues of communication." App. A-21. As this Court pointed out in *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the "leading purpose" in adoption of the First Amendment was to permit speech activities *without* the prior restraint of a license requirement. This Court's prior decisions have uniformly recognized that any licensing law for speech-related activities imposes, by definition, a prior restraint and is only permissible

if attended by strict procedural safeguards to guarantee against its misuse as a tool for censorship.[15]

Under the test which the Court of Appeals mistakenly derived from *Renton*, license requirements for adult businesses are presumed to be content-neutral, and on that basis are not required to be subjected to strict scrutiny. Yet many of this Court's cases (cited in n. 15, *supra*) involved content-neutral licensing laws which had the potential to be used as tools of censorship. For this reason, the cases cited have required that licensing laws (as opposed to time, place or manner regulations) must be strictly scrutinized to make sure there is no possibility they can be abused by those who would seek to engage in impermissible censorship. Moreover, as *Freedman* pointed out, the potential for censorship is not limited to the situation where a license law allows too much discretion in the criteria for denial. Rather, the entire statutory scheme for obtaining a license and for seeking judicial review from its denial is fraught with the possibility for more indirect, but no less effective, forms of censorship, such as censorship by delay or by the harrassing effect of unduly onerous procedures for exhaustion of the license application process. Only by adhering to this strict standard of scrutiny for *all* licensing

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15 *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Saia v. People of State of New York*, 334 U.S. 558 (1948); *Kunz v. People of State of New York*, 340 U.S. 290 (1951); *Lovell v. Griffin, supra;* and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

laws affecting First Amendment activity can the courts be faithful to the concern of the Framers, who, as articulated in *Lovell, supra*, expressed an intense hostility to any prior licensing of First Amendment activity due to its inherent potential for censorship.

Finally, nothing in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), remotely suggested that a *licensing* ordinance (even for an adult business) could ever be analyzed as a time, place or manner regulation. Unlike the situation in *Renton*, which involved a regulation of the *place* where speech activities could be conducted, a license requirement is an absolute prerequisite to engage in that speech at any place, at any time, or in any manner whatsoever. The danger to First Amendment freedoms if any licensing law is to be analyzed under the deferential standard of review of time, place and manner restrictions is sufficiently great to compel this Court's review.

C. The Court of Appeals' Conclusion that None of the Procedural Safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) Apply to a Law Requiring a License to Operate an Adult Entertainment Business Conflicts With the Opinions of Other Federal Courts of Appeals and State Courts of Last Resort and Involves a Federal Question of Nationwide Importance Which Should Be Decided by This Court.

After concluding that the deferential standard of review reserved for time, place and manner regulations was the appropriate standard for testing the constitutionality of the

Dallas licensing law, the Court of Appeals then rejected the notion that the law should contain the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965). The Court reasoned that procedural safeguards "are less important when a regulation restricts the conduct of an ongoing commercial enterprise" because "[t]he ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately." App. A-9-10.[16]

It is no secret that the content of the materials sold or exhibited by adult entertainment businesses makes them an extremely likely target for whatever form of censorship local authorities believe they can impose without violating civil rights laws. There could hardly be a type of business more needy of *Freedman's* procedural safeguards than adult entertainment businesses. One's willingness or ability to litigate a permit denial is of little use where licensing officials can endlessly delay rendering any final, judicially reviewable decision on a license application. Frankly, an adult entertainment business is

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16 Judge Thornberry, in dissent, pointed out the flaw in the majority's reasoning: "The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. Such an argument seems to me to defy common sense. A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to be unacceptable speech, contravenes the precepts of the First Amendment." App. A-25.

precisely the very type of businesses *most* likely to be subjected to this type of censorial delay.

Although this Court has subsequently applied *Freedman's* procedural safeguards in numerous contexts other than a direct administrative censorship scheme,[17] it has not yet directly addressed whether, and the extent to which, *Freedman*'s safeguards should apply to a law requiring a license to operate a commercial enterprise engaged in communicative activity. However, many lower court opinions, including federal courts of appeals and state courts of last resort, have concluded that some or all of *Freedman*'s procedural safeguards do apply to this type of licensing requirement.[18]

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17 *See, e.g., Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981) (affirming without opinion judgment of court of appeals striking down Washington's moral nuisance statute because of its failure to provide procedural safeguards of *Freedman*); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (holding *Freedman*'s procedural safeguards applicable to a judicial prior restraint imposed by the issuance of a preliminary injunction of indefinite duration against the exhibition of allegedly obscene materials); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (holding *Freedman*'s procedural requirements applicable to an application by a theatrical production company for use of municipal concert hall); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (holding *Freedman*'s procedural requirements applicable to seizures of allegedly obscene photographs by customs officials); and *Blount v. Rizzi*, 400 U.S. 410 (1971) (holding *Freedman*'s safeguards applicable to seizures of allegedly obscene materials by postal authorities).

18 The following courts of appeals have recognized the applicability of *Freedman*'s procedural safeguards to laws requiring a license to operate one of more types or adult entertainment businesses: *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 114 (2d Cir. 1985) (striking down a law requiring a police permit for coin-operated viewing machines because, *inter alia*, it failed to comply with *Freedman*'s requirement of a statutory procedure for prompt judicial review of a permit denial); *414 Theatre Corp.*

For all the reasons above, this Court should resolve the extremely important question of whether, and to what extent, the procedural safeguards of *Freedman v. Maryland* should apply to a law requiring a business license as a prerequisite to the operation of an adult entertainment business.

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v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1984) (holding, *inter alia*, that *Freedman*'s procedural requirements are fully applicable to a law requiring an adult bookstore to have a license to maintain coin-operated film machines); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 505-06 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1980) (holding that failure to comply with *Freedman*'s strict procedural requirements necessitated the invalidation of an ordinance providing for the revocation or suspension of a movie theater's license); and *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1060 (9th Cir. 1986) (holding that a licensing law for erotic dancers was unconstitutional to the extent that the county failed to demonstrate a need for the ordinance's five-day delay between the filing of an application and the granting of a license).

Similarly, a number of state courts and federal district courts have held *Freedman*'s procedural safeguards are applicable to licensing laws directed against adult entertainment businesses. *See, e.g.: Little v. City of Greenfield*, 575 F. Supp. 656, 664 (E.D. Wis. 1983) (holding *Freedman*'s procedural requirements applicable to law requiring special use permit to operate a restaurant or tavern featuring nude dancing); *Wendling v. City of Duluth*, 495 F. Supp. 1380, 1386-87 (D. Minn. 1980) (holding *Freedman*'s procedural requirements fully applicable to law requiring license to operate adult bookstore); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F. Supp. 803, 821 (E.D. Mich. 1985) (finding unconstitutional a conditional use permit provision which required submission of a site plan application because "[t]he lack of time limits governing the Commission and Board of Zoning Appeals' decision raised the possibility that these boards could effectively exclude such adult entertainment facilities from Warren altogether"); *McKinney v. City of Birmingham*, 291 So.2d 761 (Ala. 1974), *cert. denied*, 420 U.S. 950 (1975) (reversing a conviction for operating a theater without a business license, finding that the licensing law failed to contain the requisite procedural safeguards of *Freedman*); *Burton v. Municipal Court*, 441 P.2d 281 (Cal. 1968) (holding, as one of many grounds for striking down a motion picture theater licensing ordinance, that it failed to comply "with the procedural requirements for prior censorship set forth in *Freedman*"), and *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 988 (Colo. 1981) (holding that a temporary zoning moratorium on the presentation of live nude entertainment was an impermissible prior restraint lacking the procedural safeguards of *Freedman*).

II

THE DECISION OF THE COURT OF APPEALS ALLOWING A MUNICIPALITY TO USE A TIME, PLACE AND MANNER ANALYSIS ON A ZONING ORDINANCE WHICH IS BEING APPLIED RETROACTIVELY TO CLOSE AN ENTIRE CLASS OF BUSINESSES, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SCHAD V. BOROUGH OF MOUNT EPHRAIM*, 450 U.S. 61 (1981), AND WITH A DECISION OF ANOTHER COURT OF APPEALS.

A. The Court Should DetermineWhether the Strict Scrutiny Standard of Review, Mandated by *Schad* in Zoning Cases Involving Substantial First Amendment Restrictions, Has Been Abandoned.

The Court of Appeals applied the deferential standard of review from *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) in determining the constitutionality of the Dallas zoning provisions. The court stated that any zoning ordinance applied to sexually oriented businesses need only be a reasonable time, place and manner regulation. The Court did not discuss this Court's statement in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) that:

> . . . the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

Apparently, the Court of Appeals concluded that this Court, in deciding *Renton*, has abandoned *Schad*, even though the court gave no indication in its *Renton* decision that this is so.

That conclusion is unwarranted by any statement in *Renton*. In that case, the Renton ordinance did not affect any existing adult businesses -- *because there were none*. Further, the land area left legally available in *Renton* was sufficient to accommodate over 400 such businesses, which (based on the size and population of that community) certainly provided a "myriad"[19] of locations for adult theaters. Where the *Renton* ordinance was found to have imposed no significant restriction on adult theaters, the Dallas ordinance forces the closure of 92% of that city's adult businesses.

The Court of Appeals' decision cannot be supported by any statement in *Renton*, and is in direct conflict with the prior statement of this Court in *Schad*. In that case,the Court required that a zoning ordinance, which excluded a broad category of protected expression from the community, must be narrowly drawn and must further a sufficiently substantial governmental interest. 452 U.S. at 68. The Court scrutinized the evidence presented by the Borough, and concluded that the Borough "ha[d] not adequately justified its substantial restriction of protected activity." *Id.* at 72.

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19 See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 35 (1976).

The Dallas zoning ordinance will drastically reduce the number of adult cabarets operating in the city, if it does not eliminate them altogether. *See* nn. 8 and 11, *supra*. Apparently because the city has left slightly more than 8% of its land area available for adult businesses, the District Court concluded that the number of adult businesses will not be significantly affected. Neither the District Court nor the Court of Appeals took into account the impact of the ordinance on the adult cabarets, every one of which will be forced to close.

Yet, as this Court observed in *Schad:*

> Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression. See *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968).

Id. at 68, n.7.

Therefore, this Court should grant review in this case, to state that *Schad* has not been abandoned, and that any ordinance with a significant impact on freedom of expression be subjected to strict scrutiny. Otherwise, as Justice O'Connor wrote in *Arcara v. Cloud Books, Inc.*, 477 U.S. ____, ____, 106 S.Ct. 3172, 3178 (1986) (O'CONNOR, J., with STEVENS, J., concurring):

> . . . If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.

B. The Decision Allowing a City to Close Lawfully Operating Pre-existing Businesses has Created a Direct Conflict Between Two United States Courts of Appeals.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976), the plurality opinion noted with approval the finding of the trial court that ". . . the Ordinances do not affect the operation of existing establishments but only the location of new ones." The Ninth Circuit observed, in *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985), that:

> . . . There are apparently no appellate cases since *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses.

In 1986, following this Court's decision in *Renton*, this Court remanded another case to the Ninth Circuit for further consideration in light of the *Renton* opinion. On remand, the Court of Appeals, in *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1336 (9th Cir. 1987), made the following observation:

> . . . The City of Whittier ordinance is similar to the *American Mini Theatres* ordinance with one exception: the City of Whittier ordinance would close an existing business. The zoning ordinance in *American Mini Theatres* applied prospectively only and prescribed where adult theatres could be opened . . . it did not force existing adult theaters to close. 427 U.S. at 52-55 . . . [T]here is little doubt that a majority [of the Supreme Court] would have questioned an ordinance putting existing theaters out of business.

Thus, the decision in the instant case creates a direct conflict between two circuits which this Court should resolve.

C. The Decision of the Court of Appeals Will Encourage Cities Across the United States to Close Thousands of Adult Businesses Without Any Evidence That Those Businesses Are Causing Adverse Secondary Effects in Their Communities.

The City of Dallas has now received approval from the Court of Appeals of their process to force the closure of every adult cabaret in the city, relying not on any evidence that the cabarets had caused any adverse secondary effects, but relying on a study from Austin, Texas which showed that some adult cabarets in that city were located in high crime areas. The message from the Court of Appeals' opinion is, unfortunately, that a city need not fear close scrutiny of an ordinance closing pre-existing adult businesses. A city can now expect that if it can find any study anywhere that some other city might have

had problems with one type of adult businesses, it can enact a zoning ordinance to close *all* of its adult businesses.

The chilling effect on freedom of expression is tremendous. A prospective operator of an adult cabaret would know that he could expend hundreds of thousands of dollars to open a new business, operate that business in total compliance with every law, cause or contribute to absolutely no deleterious effects whatsoever, and see his business wiped out by a subsequently enacted ordinance based on the "Austin study" and the opinion of the Court of Appeals in this case.

This Court, which has so zealously protected the rights of the minority and the unpopular to free expression for so many years cannot allow this wholesale rewriting of the law. If, indeed, local governments are not to be given such broad and practically unlimited authority to close the doors of adult businesses, that statement of the prevailing law must come from this Court.

D. This Court Should Require That When a City Attempts to Close a Lawfully Operating Pre-existing Business, the City Must Demonstrate that the Business is Causing, or Contributing to, Adverse Secondary Effects.

At the time Chapter 41A was enacted, there were 29 adult cabarets in the City of Dallas. The record before the City Plan Commission and the City Council contained not one word that any of these businesses had ever caused, or even contributed to, any adverse secondary effects in the

community.[20] Nevertheless, they were included in the ordinance, and the effect of the zoning and distance restrictions is to mandate the closure of every one of them on or before June 18, 1989.[21]

Thus, the decision below upholding the zoning provisions of the Dallas ordinance stands for two very dangerous propositions: (1) a city can close all adult businesses if it finds some evidence that one type of business may cause adverse secondary effects; and (2) a city can close lawfully operating adult businesses, causing no adverse secondary effects, if it can find a study somewhere in the United States where another city had problems with adult businesses.[22]

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20 The cabarets introduced considerable evidence in the district court that they had caused no adverse secondary effects. The City introduced no evidence to the contrary, choosing to rely on the Austin study. The trial court found this reliance appropriate.

21 As of the date of filing this Petition, the number of adult cabarets has decreased from 29 to 19. Significantly, not one new adult cabaret has opened in the city.

22 Consider the following actual, and illogical, situation: The City of Boynton Beach, Florida examined police calls to its two topless bars in all of 1987, and compared the number with police calls to the city's "non-topless" bars. The statistics revealed that the topless bars had far fewer calls than the other clubs.

Now, ironically, Boynton Beach is faced with this rather bizarre problem. It can relocate its two topless bars, which are causing far fewer problems, into high-crime, industrial, poorly lit, unsafe areas (assuming there are such areas in the city) and rely on the Court of Appeals' opinion in this case as its authority. However, because Florida law requires a nuisance abatement procedure to close the other establishments -- the ones generating most of the police calls -- the city can do very little with them.

Therefore, this Court should grant review to determine if a pre-existing business presenting protected expression can be summarily closed by retroactive legislation, even when that business causes no adverse secondary effects in the community.

DATED June 13, 1988

Respectfully submitted

Richard L. Wilson
Attorney for Petitioners

applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:

(1) the extent and nature of his past criminal activity;

(2) his age at the time of the commission of the crime;

(3) the amount of time that has elapsed since his last criminal activity;

(4) his conduct and work activity prior to and following the criminal activity;

(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.

(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.

(c) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. 19196)

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is $500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring

comp[illegible]ce with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business. (Ord. 19196)

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(10(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed since the termination of any sentence, parole, or probation. (Ord. 19196)

SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved

party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's action on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined by the Dallas Development Code;

(4) a public park adjacent to a residential district as defined by the Dallas Development Code; or

(5) the property line of a lot devoted to residential use.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary

or secondary school, or to the nearest boundary of an affected public public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential

district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. 19196)

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually

oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and received another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that

a sofa may be placed in a reception room open to the public. (Ord. 19196)

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than

10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

SEC. 41A 19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereot specifying the location of one or more manager's stations and the location of

all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manger's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed $1,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41a-13, upon conviction, is punishable by a fine not to exceed $200.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. 19196)

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit

for injunction as well as prosecution for criminal violations. (Ord. 19196)

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

8343H

APPENDIX C

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

THE CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

JOHN RANDALL DUMAS d/b/a GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

CALVIN BERRY, III, et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 2/12/88, 5 Cir., 1988, _____ F.2d ____)

(March 14, 1988)

Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. Judge Thornberry would grant rehearing for the reasons expressed in his dissent to the majority opinion. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

APPENDIX D

In The

Supreme Court Of The United States

ORDER LIST

WEDNESDAY, MAY 4, 1988

ORDER IN PENDING CASE

A-800 **FW/PBS, INC. DBA PARIS ADULT BOOKSTORE II, ET AL. V. CITY OF DALLAS, ET AL.**

The application for stay filed with Justice White has been referred to the Court. Justice White's temporary stay is hereby vacated. The application for stay is granted and the judgment of the United States Court of Appeals for the Fifth Circuit is stayed except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution pending the timely filing and disposition of a petition for a

writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.